

**Iowa Department of Natural Resources
Environmental Protection Commission**

ITEM

15

INFORMATION

TOPIC

Draft amendments to 65.10(5); construction permit “demand for hearing” procedures

At the October, 2008 meeting, the Commission requested that the Department’s Legal Services Bureau prepare draft amendments to rules regarding construction permit “demand for hearing” procedures. The draft amendments to subrule 65.10(5) are highlighted in yellow.

As requested by the Commission, the draft amendments address the role of Department staff, document exchange requirements, burden of proof and additional time for the Commission to provide a written statement of the reasons for a decision. In addition, the draft amendments include an option for the Commission to appoint a review committee of not more than four Commissioners to consider an application prior to the Department’s preliminary determination and make a recommendation to the Commission in the event of a demand for hearing.

Ed Tormey, Chief
Legal Services Bureau

January 5, 2009

65.10(5) Determination by the department. The department must receive the county board of supervisors' comments or evaluation for approval or disapproval of an application for a construction permit not later than 30 days following the applicant's delivery of the application to the department. Regardless of whether the department receives comments or an evaluation by a county board of supervisors, the department must render a determination or a preliminary determination to approve or disapprove an application for a construction permit within 60 days following the applicant's delivery of an application to the department. However, the applicant may deliver a notice requesting a continuance. Upon receipt of a notice, the time required for the county or department to act upon the application shall be suspended for the period provided in the notice, but for not more than 30 days after the department's receipt of the notice. The applicant may submit more than one notice. However, the department may terminate an application if no action is required by the department for one year following delivery of the application to the board. The department may also provide for a continuance when it considers the application. The department shall provide notice to the applicant and the board of the continuance. The time required for the department to act upon the application shall be suspended for the period provided in the notice, but for not more than 30 days. However, the department shall not provide for more than one continuance. If review of the application is delayed because the application is incomplete, and the applicant fails to supply requested information within a reasonable time prior to the deadline for action on the application, the permit may be denied and a new application will be required if the applicant wishes to proceed. If the commission has appointed a review committee as provided in 65.10(9) the department shall provide information requested by the committee regarding the application and the status of the department's review. The review committee may request that the department provide notice of a continuance, if available, and consider additional issues before rendering a preliminary determination.

The department will approve or disapprove an application as follows:

a. If the county board of supervisors does not submit a construction evaluation resolution to the department, fails to submit an adopted recommendation, submits only comments, or fails to submit comments, the department shall approve the application if the application meets the requirements of this chapter and, Iowa Code chapter 455B 459, orders issued by the department, and terms and conditions applicable to permits, certifications or manure management plans required by Iowa Code chapter 459. The department will disapprove the application if it does not meet such requirements.

b. If the board of supervisors for the county in which the confinement feeding operation is proposed to be constructed has filed a county construction evaluation resolution and submits an adopted recommendation to approve the construction permit application, which may be based on a satisfactory rating produced by the master matrix, to the department, the department shall preliminarily approve an application for a construction permit if the department determines that the application meets the requirements of this chapter and, Iowa Code chapter 455B 459, orders issued by the department, and terms and conditions applicable to permits, certifications or manure management plans required by Iowa Code chapter 459. The department shall preliminarily disapprove an application that does not satisfy the requirements of this chapter and, Iowa Code chapter 455B 459, orders issued by the department, and terms and conditions applicable to permits, certifications or manure management plans required by Iowa Code chapter 459 regardless of the adopted recommendation of the board of supervisors. The department shall consider any timely filed comments made by the board as provided in this subrule to determine if an application meets the requirements of this chapter and, Iowa Code chapter 455B 459, orders issued by the department, and terms and conditions applicable to permits, certifications or manure management plans required by Iowa Code chapter 459.

c. If the board submits to the department an adopted recommendation to disapprove an application for a construction permit that is based on a rating produced by the master matrix, the department shall first determine if the application meets the requirements of this chapter and, Iowa Code chapter 455B 459, orders issued by the department, and terms and conditions applicable to

permits, certifications or manure management plans required by Iowa Code chapter 459. The department shall preliminarily disapprove an application that does not satisfy the requirements of this chapter ~~and~~, Iowa Code chapter ~~455B~~ 459, orders issued by the department, and terms and conditions applicable to permits, certifications or manure management plans required by Iowa Code chapter 459 regardless of any result produced by using the master matrix. If the application meets the requirements of this chapter ~~and~~, Iowa Code chapter ~~455B~~ 459, orders issued by the department, and terms and conditions applicable to permits, certifications or manure management plans required by Iowa Code chapter 459, the department shall conduct an independent evaluation of the application using the master matrix. The department shall preliminarily approve the application if it achieves a satisfactory rating according to the department's evaluation. The department shall preliminarily disapprove the application if it produces an unsatisfactory rating regardless of whether the application satisfies the requirements of this chapter ~~and~~, Iowa Code chapter ~~455B~~ 459, orders issued by the department, and terms and conditions applicable to permits, certifications or manure management plans required by Iowa Code chapter 459. The department shall consider any timely filed comments made by the board as provided in this subrule to determine if an application meets the requirements of this chapter ~~and~~, Iowa Code chapter ~~455B~~ 459, orders issued by the department, and terms and conditions applicable to permits, certifications or manure management plans required by Iowa Code chapter 459.

65.10(6) *Departmental notification of permit application decision.* Within three days following the department's determination or preliminary determination to approve or disapprove the application for a construction permit, the department shall deliver a notice of the decision to the applicant.

a. If the county board of supervisors has submitted to the department an adopted recommendation for the approval or disapproval of a construction permit application, the department shall notify the board of the department's preliminary decision to approve or disapprove the application at the same time. For a preliminary decision to approve an application, the notice shall consist of a copy of the draft construction permit. For a preliminary decision to disapprove an application, the notice shall consist of a copy of the department's letter of preliminary denial. The preliminary decision to approve or disapprove an application becomes final without further proceedings if neither the county board of supervisors nor the applicant demands a hearing before the commission or appeals pursuant to 65.10(7) and 65.10(8).

b. If the county board of supervisors has not submitted to the department an adopted recommendation for the approval or disapproval of a construction permit application, the department notice shall include the construction permit or letter of denial. The applicant may appeal the permit or denial as provided in 65.10(8).

65.10(7) *County demand for hearing.* A county board of supervisors that has submitted an adopted recommendation to the department may contest the department's preliminary decision to approve or disapprove an application by filing a written demand for a hearing before the commission. Due to the need for expedited scheduling, the county board of supervisors shall, as soon as possible but not later than 14 days following receipt of the department's notice of preliminary decision, notify the chief of the department's water quality bureau by facsimile transmission to (515)281-8895 that the board intends to file a demand for hearing. The demand for hearing shall be mailed to Director, Department of Natural Resources, Henry A. Wallace Building, 502 East Ninth Street, Des Moines, Iowa 50319, and must be postmarked within 14 days following receipt of the department's notice of preliminary decision. The demand shall include a statement providing all reasons why the application should be approved or disapproved according to legal requirements in this chapter ~~and~~, Iowa Code chapter ~~455B~~ 459, orders issued by the department, and terms and conditions applicable to permits, certifications or manure management plans required by Iowa Code chapter 459; legal briefs and any other documents to be considered by the commission or a statement indicating that no other documents will be submitted for consideration by the commission; and a statement indicating whether oral argument before the commission is desired.

65.10(8) *Applicant demand for hearing; appeal.* The applicant may contest the department's decision or preliminary decision to approve or disapprove an application by filing a written demand

for a hearing. The applicant may elect to have the hearing conducted as a contested case before an administrative law judge pursuant to 561—Chapter 7, or before the commission pursuant to subrule 65.10(9). The demand for hearing shall indicate which procedure the applicant elects.

a. Applicant demand for hearing before the commission. Due to the need for expedited scheduling, the applicant shall, as soon as possible but not later than 14 days following receipt of the department's notice of preliminary decision, notify the chief of the department's water quality bureau by facsimile transmission to (515)281-8895 that the applicant intends to file a demand for hearing; however, in cases in which the applicant would not demand a hearing unless the county demanded one, the applicant will be allowed an additional three working days to file a demand. It is the responsibility of the applicant to communicate with the department to determine if a county demand has been filed. The demand for hearing shall be mailed to Director, Department of Natural Resources, Henry A. Wallace Building, 502 East Ninth Street, Des Moines, Iowa 50319, and must be postmarked within 14 days following receipt of the department's notice of preliminary decision, or such longer time as authorized in this paragraph. The demand shall include a statement providing all reasons why the application should be approved or disapproved without specified conditions according to legal requirements in this chapter and, Iowa Code chapter 455B 455B 459, orders issued by the department, and terms and conditions applicable to permits, certifications or manure management plans required by Iowa Code chapter 459; legal briefs and any other documents to be considered by the commission or a statement indicating that no other documents will be submitted for consideration by the commission; and a statement indicating whether oral argument before the commission is desired. If both the applicant and a county board of supervisors are contesting the department's preliminary decision, the applicant may request that the commission conduct the hearing on a consolidated basis.

b. Applicant contested case appeal. The applicant may appeal a permit or letter of denial according to the contested case procedures set forth in 561—Chapter 7; however, if the county has demanded a hearing pursuant to subrule 65.10(7), a demand for hearing must be filed within the time frames set forth in paragraph "a." If both the applicant and a county board of supervisors are contesting the department's preliminary decision, the applicant may request that the hearings be consolidated and conducted as a contested case.

65.10(9) Decision by the commission. The director shall schedule a hearing on a demand pursuant to 65.10(7) or 65.10(8) "a" for consideration at the next regular meeting of the commission and notify the county board of supervisors and the applicant of the time and place. However, if the next regular meeting of the commission will take place more than 35 days after receipt of the demand for hearing, the director shall schedule a special in-person meeting or an electronic meeting of the commission pursuant to Iowa Code section 21.8. The director shall provide the applicant with copies of all documents submitted by the county board of supervisors and a copy of the department's file on the permit application within three days after receipt of the county board of supervisors' comments. The applicant may submit responses or other documents for consideration by the commission postmarked or hand-delivered at least 14 7 days prior to the date of consideration by the commission. Consideration by the commission is not a contested case. Oral participation before the commission will be limited to time periods specified by the commission and, unless otherwise determined by the commission, to argument by representatives from the county board of supervisors, the applicant and the department. The party filing a demand for hearing opposing the department's preliminary decision shall have the burden to establish by a preponderance of the evidence that the preliminary decision does not comply with legal requirements in this chapter, Iowa Code chapter 459, orders issued by the department, and terms and conditions applicable to permits, certifications or manure management plans required by Iowa Code chapter 459. In rendering its decision the commission shall only consider documents and oral statements provided by representatives from the county board of supervisors, the applicant and the department. Representatives of the department shall not advocate for either the county board of supervisors or the applicant but may summarize the basis for the department's preliminary decision and respond to questions by members of the commission. The commission may also consider the recommendation of a review committee consisting of not more than 4 commission

members appointed by the commission to evaluate the technical aspects of applications and the adopted recommendations by county boards of supervisors. The decision by the commission shall be stated on the record and shall be final agency action pursuant to Iowa Code chapter 17A. Within 30 days of the decision the commission may file a written statement of the basis for the decision. If the commission reverses or modifies the department's decision, the department shall issue the appropriate permit or letter of denial to the applicant. The letter of decision shall contain the reasons for the action regarding the permit.